In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 463

RAYMOND L. STOVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court is reported at 204 F. Supp. 477. The opinion of the court of appeals (Pet. App. i–v)[1] is reported at 332 F. 2d 204.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1964 (Pet. App. viii). A timely petition for rehearing was denied on June 9, 1964 (Pet. App. vi). The petition for a writ of certiorari was filed on September 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition for certiorari, and "Pet." refers to that petition.

746-389—64

QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that the United States shall not be liable "for any damage from or by floods or flood waters," bars recovery against the United States for flooding which followed major storms and damaged property near a federally constructed flood control project.

STATUTE INVOLVED

The Act of May 15, 1928, 45 Stat. 535, 33 U.S.C. 702c, provides in pertinent part:

Section 3.

* * * * * *

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place:

* * *

STATEMENT

This action was brought under the Federal Tort Claims Act to recover damages caused when levees on the Feather River broke during a period of extraordinary rainfall.[2] The levees had been constructed throughout the Feather River basin in the Sacramento Valley by the United States and the State of California.

In December 1955, a series of major storms swept over the area, in what was described by the district court as a "singularly extraordinary period of weather phenomena." Two storms in the early part of the month soaked the soil to saturation. From the

[2] A full discussion of the facts may be found in the district court decision, reported at 204 F. Supp. 477.

16th to the 23rd of the month, three major storms deluged the area. During the two-week period beginning December 15, this area received from 40 to 65 percent of its normal *annual* precipitation. On December 23, breaks occurred in the levees, and the flood waters which escaped their confines allegedly resulted in damage to petitioners.

In their actions for damages, petitioners alleged negligence in the planning, design, construction, maintenance and operation of the levees and other works of the Sacramento River Flood Control Project. The district court, ruling only upon the government's defense under 33 U.S.C. 702c, found that "unusual and extraordinary climatic conditions" existed in December 1955 which caused maximum or near maximum record streamflows involved in this case." It sustained the statutory defense and rejected petitioners' contention that Section 702c was impliedly repealed by the Federal Tort Claims Act. The district court also held that there had been no "taking" by the United States which would be compensable under the Fifth Amendment. The court of appeals affirmed, holding that 33 U.S.C. 702c would bar recovery even if it were proved that the flood control projects were negligently constructed or maintained and that weather conditions had been normal.

ARGUMENT

The decisions below applied an unequivocal statutory command that the government is not to be held liable for damage resulting from floods or flood waters. Whether or not the statute would extend, as the court

of appeals apparently believed, to damage caused solely by faulty construction or maintenance of a levee, it must apply, if it is to have any meaning at all, to the circumstances of this case, which involved floods attributable to extraordinary weather conditions as well as to any allegedly negligent construction and maintenance of the project. Hence the result reached by the courts below is correct, and this case does not warrant further review by this Court.

1. Petitioners' basic contention is that 33 U.S.C. 702c shields the United States from liability only if flood damage has been "caused solely by an act of the elements" (Pet. 10, 25–30). Such a reading renders the statutory provision nugatory since the United States, like any private defendant, could not, even absent the statute, be held liable for injuries caused entirely by excessive rainfall or floods attributable solely to extraordinary weather conditions. Indeed, since the statute was enacted in 1928—before the enactment of the Federal Tort Claims Act and at a time when the government could not be liable in tort—it is hardly likely that Congress then intended to preserve any right of action based upon negligent construction or maintenance of flood control projects. It rather appears from the legislative history that it was Congress' intention to render the United States liable for any property taken for use in flood control projects, including all forms of easements, but to protect the government broadly from all claims for compensation based upon consequential flood damage to property situated near the projects. It is significant in

this regard that the statute speaks of "liability of any kind" and is framed in all-encompassing terms.

2. There is no merit to petitioners' contention (see Pet. 22–23) that the immunity provided by 33 U.S.C. 702c was impliedly repealed by the enactment of the Federal Tort Claims Act. This argument has been consistently rejected by all courts in which it has been raised. See, *e.g.*, *Clark* v. *United States*, 218 F. 2d 446 (C.A. 9); *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967; *B. Amusement Co.* v. *United States*, 180 F. Supp. 386 (Ct. Cl.); *Villarreal* v. *United States*, 177 F. Supp. 879 (S.D. Tex.); *Peterson* v. *United States*, 217 F. Supp. 867 (D. Alaska).

3. With respect to petitioners' challenge to the doctrine of sovereign immunity (Pet. 30–35), it should be observed that this is not a case in which the common law doctrine is in issue. Petitioners' complaint was dismissed because of a statutory immunity granted by Congress—a power which Congress has always been assumed to have even with respect to liability of the United States. See, *e.g.*, *United States* v. *Neystadt*, 366 U.S. 696.

4. Petitioners' claims that their property was "taken" within the meaning of the Fifth Amendment were presented in actions brought by them in the Court of Claims contemporaneously with the present suit in the district court.[3] The Court of Claims dismissed petitioners' actions under 28 U.S.C. 1500,

[3] These claims could not be made in the district court which has jurisdiction in condemnation cases only if they involve $10,000 or less. 28 U.S.C. 1346(a)(2).

which provides that the "Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States * * *." *Audet v. United States*, 157 Ct. Cl. 944, certiorari denied, 371 U.S. 889.

Petitioners now contend that they have been deprived of their condemnation claims by reason of the dismissal of each of their suits (Pet. 36–37). It seems clear, however, that since the Court of Claims' dismissal was not on the merits, petitioners are free to reassert their claims, subject to any limitations defenses available to the United States, once the present action is terminated. In any event, the condemnation claims are patently without merit. Petitioners' property may have been damaged by the floods, but it was obviously not appropriated for the use of the United States or for the construction of the flood control project. See *Sanguinetti v. United States*, 264 U.S. 146, 149–150, where this Court observed that for a "taking" it was "at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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